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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 797

WOOD-MOSAIC COMPANY, - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

AND

WOOD-MOSAIC CORPORATION, - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BERNARD H. BARNETT,
Attorney for Petitioners.

S. L. GREENEBAUM,
CHARLES F. WOOD,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 2

Statement 3

Proceedings in the United States District Court for the Western District of Kentucky 9

Proceedings in the Court of Appeals for the Sixth Circuit 9

Reasons for Granting the Writs 10

The decisions below are in direct conflict with the rule of statutory interpretation applied by this Court in a long line of decisions and with the rule applied by the Court of Appeals for the Fifth Circuit in interpreting the Excess Profits Tax Act of 1950... 10

Certiorari should be granted because the issue decided by the Court of Appeals is of wide application. 14

Certiorari should be granted because the decision of the Sixth Circuit is so erroneous as to work an injustice on the petitioners 14

Conclusion 16

CITATIONS

Cases:

	PAGE
Cox v. Roth, 348 U. S. 207	11
Gould v. Gould, 245 U. S. 151	15
Mastro Plastics Corp. v. N. L. R. B., 350 U. S. 270	11
Phinney v. Tuboscope Co., 268 Fed. 2d 233	13
United States v. Manasche, 248 U. S. 528	10

Statutes:

Title 26, Section 2	25
Excess Profits Tax Act of 1950 (United States Code Annotated, Title 26, Excess Profits Taxes)	26
Title 26, Part I, Section 434(a)	26
Title 26, Part I, Section 435(a), (b), (c)	26
Title 26, Part I, Section 445(a), (g)(1)(2)(A)(B)-(C)(3), (h)(1)(2)	27
Title 26, Part II, Section 461(a)(1)(A), (b)(1), (d)	28
Title 26, Part II, Section 462(g)(3)	30

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WOOD-MOSAIC CORPORATION, - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that writs of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion and judgment of the Court of Appeals is printed in the Appendix hereto (App. 17). It is reported in 272 Fed. 2d 944. The opinion of the United States District Court for the Western District of Kentucky is printed in the Appendix hereto (App. 17). It is reported in 160 Fed. Supp. 631.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 22, 1959 (App. 17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Is Part II of the Excess Profits Tax Act of 1950 elective, or are the petitioners required to compute their excess profits tax credits pursuant to Sections 461 and 462 of Part II of the Act even though the petitioners met all of the requirements necessary to compute their excess profits tax credits pursuant to Sections 435 and 445 of Part I of the Act, and elected so to do?

STATUTES INVOLVED.

Title 26, Section 2.

Excess Profits Tax Act of 1950.

(United States Code Annotated Title 26, Excess Profits Taxes.)

Title 26, Part I, Section 434(a).

Title 26, Part I, Section 435(a), (b), (c).

Title 26, Part I, Section 445(a), (g)(1)(2)(A)-(B)(C)(3), (h)(1)(2).

Title 26, Part II, Section 461(a)(1)(A), (b)(1), (d).

Title 26, Part II, Section 462(g)(3).

The texts of the statutes involved are set forth in the appendix hereto (App. 25 to 30).

STATEMENT.

The petitioner, Wood-Mosaic Company, hereinafter referred to as "New Company", was incorporated under the laws of Kentucky in November of 1947. Shortly after the incorporation of New Company, Wood-Mosaic Corporation, hereinafter referred to as "Old Company", transferred all of its operating assets in the United States to the New Company, in exchange for stock of the New Company.

Old Company was incorporated under the laws of Kentucky in 1907 under the original name of "Wood-Mosaic Company". In November of 1947, its name was changed from "Wood-Mosaic Company" to "Wood-Mosaic Corporation".

In computing the excess profits tax credits pursuant to the Excess Profits Tax Act of 1950, the New Company applied the sections of Part I of the Act which are paraphrased and interpreted below:

Paraphrase of Applicable Provisions of Korean War Excess Profits Tax Act.	Interpretation of Applicable Provisions of Korean War Excess Profits Tax Act.
PART I (ONE).	
"Section 435. Excess Profits Credit—Based on Income.	The excess profits tax credit based on income is provided in Section 435. That section provides the taxpayer's income credit shall be determined from its "base period net income" unless the taxpayer is a "new
"(a) . . . The excess profits credit [of New Company] for . . . [each of the] taxable year[s], computed under . . . [Section 435], shall be—	

PART I (ONE) (Continued)

(1) . . . [Based on its average base period net income] . . . .

* * *

"(c) . . . For the purposes of . . . [determining the excess profits credit—based upon income] the average base period net income of . . . [New Company] shall be the amount determined under subsection (d), . . . [unless New Company is a new corporation within the meaning of Section 445] then the average base period net income shall be the amount determined under either subsection (d) . . . [or under Section 445] whichever results in the lesser . . . [Korean War Excess Profits Tax]."

"Section 445. Average Base Period Net Income — New Corporation.

"(a) . . . [Since New Company] commenced business after . . . [January 1, 1946, it] shall, . . . except as provided in subsection (g), *be considered a new corporation for the purpose of this section,* and its average base period net income shall be the amount computed under subsection (b).

corporation" under Section 445, in which event it is entitled to the credit provided under Section 435 or Section 445, whichever results in the lesser excess profits tax.

New Company is a "new corporation" under Section 445, if it commenced business after the first day of its base period which was January 1, 1946. New Company commenced business on December 1, 1947, which was after the first day of its base period.

PART I (ONE) (Continued)

"(g) Ineligible Corporations.—

(1) If [New Company] . . . , *on or after December 1, 1950,* and prior to . . . [April 30, 1950], acquire[d] any properties . . . (2)(A) [in any acquisition from another corporation of properties in a *non-taxable organization, reorganization, liquidation or capital contribution,* New Company] (1) shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled . . . [to be treated as a new corporation under Section 445] except under the circumstances and subject to the limitations provided in Section 462(g)."

However, under Section 445(g), a "new corporation" under Section 445 is not entitled to be treated as a "new corporation" if it acquires property in a non-taxable organization, reorganization, liquidation or capital contribution (see Section 445(g)(2)(A)) *on or after December 1, 1950* and prior to the end of its third taxable year, except to the extenf provided in Section 462(g).

On December 1, 1947, New Company acquired the manufacturing facilities and operating assets from the Old Company in exchange for the stock of New Company. This exchange constituted a non-taxable reorganization .

Since the acquisition by New Company from Old Company occurred *prior to December 1, 1950,* the limitations prescribed by Section 445(g) are inapplicable and New Company is entitled to be treated as a "new corporation" under Section 445(a).

The Government contends the sections of Part II of the Act which are paraphrased and explained below are *mandatory* and *not elective* and, therefore, the petitioners are not entitled to rely upon the relief provisions of Part I of the Act.

Paraphrase of Applicable Provisions of Korean War Excess Profits Tax Act.	**Interpretation of Applicable Provisions of Korean War Excess Profits Tax Act.**
PART II (TWO).	
"Section 461 . . . "(a) . . . (1) . . . [New Company is an 'acquiring corporation' since it] acquired— (A) Substantially all the properties of . . . [Old Company] and the whole . . . consideration for the transfer of such properties . . . [was] the transfer to . . . [Old Company] of all of the stock of all classes . . . of [New Company; all of which constituted a *non-taxable corporate reorganization*] . . . • • • "(d) [Since New Company is an 'acquiring corporation',] [f]or purposes of Section . . . 445 . . . [New Company] which is an acquiring corporation shall be considered to have been in existence and to have had taxable years for any period	The Government contends that New Corporation is an "acquiring corporation" under Section 461(a) since it acquired all of the properties of Old Company in a *non-taxable reorganization*. The Government further contends that since New Company is an "acquiring corporation" and since Section 461(a) is applicable irrespective of the date of acquisition and because the company from which it acquired its assets (Old Company) has been in business since 1907, New Company is not a "new corporation" under Section 445, by reason of the application of Section 461(d).

PART II (TWO) (Continued).

during which it . . . was in existence, and . . . [New Company] shall be considered to have commenced business . . . . [in 1907, when the Old Company commenced business.]"	(Old Company elected to compute its excess profits tax credit pursuant to Section 435, of Part I.)

Both of the petitioners and the Government agree that:

(1) If the petitioners are entitled to use Part I (Sections 435 and 445), then the petitioners made elections allowable to them and computed their tax credit and their taxes correctly. The base period of the "New Company" is January 1, 1946.

(2) If the petitioners are not entitled to use Part I (Sections 435 and 445), but are required to use Part II (Sections 461 and 462), then the Government's calculation of the excess profits tax credit and the applications of Part II are correct.

(3) If the petitioners are entitled to use Part I (Sections 435 and 445), then New Company is "entitled to be treated as a new corporation." This is true because New Company came into existence prior to December 1950, and after the first day of its base period, and received assets for stock.

(4) If the petitioners are required to use Part II (Sections 461 and 462), then New Company is "an acquiring corporation", since it acquired the assets of the Old Company in 1947, the assets being exchanged for stock, and Old Company is a "component corporation."

(5) These cases present no factual issues.

The petitioners filed with the District Director of Internal Revenue for the District of Kentucky timely U. S. corporation income and excess profits tax returns for their fiscal years 1951, 1952 and 1953, and paid the corporate income and excess profits taxes as computed on said returns.

On March 29, 1956, the Commissioner of Internal Revenue notified the "New Company" that a determination had been made of deficiencies in income and excess profits taxes for its fiscal year ended April 30, 1951, in the sum of $118,613.00, and for its fiscal year ended April 30, 1952, in the sum of $34,861.44.

On March 29, 1956, the Commissioner of Internal Revenue notified the "Old Company" that deficiencies had been determined in its income and excess profits taxes for its fiscal year ended April 30, 1952, in the sum of $20,640.15, and for its fiscal year ended April 30, 1953, in the sum of $27,066.53.

The deficiencies and the interest thereon were paid by the petitioners to the District Director of Internal Revenue for the District of Kentucky. Both petitioners timely filed their respective claims for a refund of the deficiencies in corporate income and excess profits taxes. The claims for refund were officially disallowed, and the separate claims for refund of interest were ignored for more than six months by the Commissioner. Actions in the United States District Court for the recovery of the deficiencies paid were duly filed by both petitioners.

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

The United States District Court for the Western District of Kentucky substantially sustained the Commissioner as to the disallowance of those portions of the claims for refund which related to the recovery of the deficiencies assessed pursuant to the Commissioner's determination that Part II of the Excess Profits Tax Act of 1950 was mandatory. The District Court held the petitioner, New Company, could not consider itself a new corporation under the provisions of Section 445 of Part I, since it was also an acquiring corporation within the meaning of Sections 461 and 462 of Part II. Furthermore, the District Court held the petitioner, Old Company, could not compute its base period earning experience under the provisions of Section 435 of Part I because it was also a component corporation within the meaning of Section 461 of Part II.

PROCEEDINGS IN THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners duly and timely appealed to the Circuit Court of Appeals for the Sixth Circuit on the question of whether Part II of the Excess Profits Tax Act of 1950 was mandatory or whether the petitioners, who met the requirements of Sections 435 and 445 of Part I of the Excess Profits Tax Act of 1950, were entitled to

elect to compute their excess profits tax credits under the aforesaid sections of Part I.

The Court of Appeals affirmed the District Court in the following per curiam order:

> "The above cause coming on to be heard upon the record, the briefs of the parties and the arguments of counsel in open court, and the court being duly advised;
>
> "Now, therefore, it is ordered, adjudged and decreed that the judgment of the District Court be, and is hereby affirmed on the findings of fact and conclusions of law in the opinion of Judge Shelbourne, reported in 160 Fed. Supp. 631."

REASONS FOR GRANTING THE WRITS.

The Decisions Below Are in Direct Conflict With the Rule of Statutory Interpretation Applied by This Court in a Long Line of Decisions and With the Rule Applied by the Court of Appeals for the Fifth Circuit in Interpreting the Excess Profits Tax Act of 1950.

The cardinal rule of interpreting Federal Statutes is to give effect to every clause and word of the statute and not to emasculate any part of it.

The rule of statutory interpretation, violated by the Sixth Circuit, is stated in *United States* v. *Menasche*, 348 U. S. 528, 538, 539, where this Court, in a unanimous decision interpreting a naturalization statute, said:

> "The Government's contention that Section 405(a) does not apply to any phase in the processing of naturalization petitions would defeat and

destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' N. L. R. B. v. Jones & L. Steel Corp., 301 U. S. 1, 30, 81 L. Ed. 893, 907, 57 S. Ct. 615, 108 A. L. R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute', Montclair v. Ramsdell, 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires. * * *"

The rule of statutory interpretation violated by the Sixth Circuit was also stated by this Court in *Cox* v. *Roth*, 348 U. S. 207, 209, where the Court, in a unanimous opinion interpreting the Jones Act, said:

"* * * As the Court said in Markham v. Cabell, 326 U. S. 404, 409, 90 L. Ed. 165, 168, 66 S. Ct. 193, 'The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes. * * * The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve'."

Mr. Justice Frankfurter stated the rule in his dissenting opinion in *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 298. Justice Frankfurter wrote:

"We need not agree with a legislative judgment in order to obey a legislative command. It is enough for us that Congress did not legislate idly, but did intend the loss-of-status provision to

have an effect. 'We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.' Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 116, 25 L. Ed. 782-784. * * *"

The Sixth Circuit and the District Court each held Part II of the Excess Profits Tax Act of 1950 to be mandatory and not elective, and in so doing ignored and in effect deleted and emasculated, Section 445(g)-(2) (A) of Part I of the Act.

The petitioner, New Company, met all of the requirements of Section 445(g)(2)(A) of Part I of the Act. Petitioner, New Company, is thus entitled to be treated "as a new corporation" under Section 445(a) because it acquired the property of Old Company in a tax free exchange for stock prior to 1950 and prior to the end of its third taxable year. The Sixth Circuit per curiam order affirming the District Court erroneously held that petitioner, New Company, was required to compute its excess profits tax credit under Section 461 of Part II of the Act solely because the petitioner,

New Company, was also an acquiring corporation as defined by Section 461 of Part II of the Act.

The Sixth Circuit erroneously held the petitioner, Old Company, was not entitled to compute its excess profits tax credit under Section 435 of Part I solely because the corporation was also a component corporation within the meaning of Section 461 of Part II.

Section 461 of Part II of the Act includes all transactions described in Section 445 of Part I of the Act irrespective of whether the transactions took place prior to December 1950 or subsequent thereto. Section 461 of Part II is all inclusive and cannot be reconciled with Section 445 of Part I *unless the interpretation urged by the petitioners is adopted.* It is only by declaring Part II (Sections 461 and 462) elective that the provisions of Part I (Section 445) can be given effect. The sections (461 and 462 of Part II and 445 of Part I) are irreconcilable *if Part II of the Act is mandatory.*

The interpretation of the Excess Profits Tax Act of 1950 made by the Court of Appeals herein is in direct conflict with the rule of statutory interpretation followed by the Circuit Court of Appeals for the Fifth Circuit in interpreting the Excess Profits Tax Act of 1950 in the case of *Phinney* v. *Tuboscope Co.*, 268 Fed. 2d 233. The Fifth Circuit refused to interpret the Act in a way which would require a certain provision of Section 445 of Part I to "have no meaning."

Certiorari Should Be Granted Because the Issue Decided By the Court of Appeals Is of Wide Application.

The petition for writs of certiorari should be granted because the determination of whether Part II of the Excess Profits Tax Act of 1950 is elective or mandatory is essential in interpreting this important tax act and the relief provisions thereof. The decision is broader in scope than the particular facts presented in this case. The determination of whether Part II is elective or mandatory affects all corporations, partnerships or proprietorships which were reorganized in a tax free exchange of stock for assets prior to December 1, 1950 and were in business before December 31, 1947. The petitioners cannot state how many claims involving the statutory interpretation of Part II of the Act are pending. It is reasonable to assume that there are many cases pending in courts and cases in the negotiation stage within the administrative divisions of the Internal Revenue Service. The question is thus one of broad principle.

Certiorari Should Be Granted Because the Decision of the Sixth Circuit Is So Erroneous as to Work an Injustice on the Petitioners.

The provisions of the statute under discussion are relief provisions. The District Court and the Court of Appeals, in erroneously interpreting Part II of the Act as being mandatory, have prevented the petitioners from enjoying the benefit of the relief provisions intended by Congress. This Court has always held that

taxing statutes should, in cases of doubt, be construed most strongly against the Government. In *Gould* v. *Gould*, 245 U. S. 151, this Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. U. S. v. Wigglesworth, 2 Story, 369; American Net and Twine Co. v. Worthington, 141 U. S. 469; Benziger v. United States, 192 U. S. 38."

The Sixth Circuit and the District Court have so far departed from the basic rule and cardinal principle of statutory interpretation as to challenge basic principles which are too fundamental to the law to be destroyed or ignored in even one case.

The petitioners have suffered, because the two lower courts, by the simple device of ignoring one set of definitions in a statute, and applying another, have evaded the question which the cases present squarely. The petitioner, New Company is admittedly qualified under Section 445 to be treated as a "new corporation", yet it is denied this right by the Courts ignoring Section 445 and attaching to the New Company the definition of an "acquiring corporation" set out in Section 462 of Part II of the Act.

The respondent has never asserted that Section 445 is inapplicable nor has either of the lower courts so held. Those courts have simply ignored that section of the Act.

This Court cannot be primarily concerned with the amount of money involved in a single case, however, the petitioners have been deprived of approximately Two Hundred Thousand Dollars ($200,000.00) as the result of a clear error on the part of the Sixth Circuit, which cursorily affirmed the District Court, who admittedly found the problem presented to be "difficult." This loss results in tremendous hardship and injustice to the petitioners.

The petitioners are not requesting certiorari be granted because of mere error in the lower courts. (If this was a ground for certiorari, then the true function of this Court would be defeated.) Petitioners contend, however, the error of the Sixth Circuit is so great and represents such a substantial departure from the cardinal rule of general statutory interpretation and the basic rule of interpretation of relief provisions of taxing statutes as to require this Court to review the principles involved and to settle an important legal problem.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

BERNARD H. BARNETT,
Attorney for Petitioners.

S. L. GREENEBAUM,
CHARLES F. WOOD,
Of Counsel.

OPINION AND JUDGMENT OF THE COURT OF APPEALS (Entered December 22, 1959).

"The above cause coming on to be heard upon the record, the briefs of the parties and the arguments of counsel in open court, and the court being duly advised;

"Now, therefore, it is ordered, adjudged and decreed that the judgment of the District Court be, and is hereby affirmed on the findings of fact and conclusions of law in the opinion of Judge Shelbourne, reported in 160 Fed. Supp. 631."

OPINION (MEMORANDUM) OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

The two above styled and numbered actions were filed January 25, 1957, and, by an order dated July 17, 1957, they were consolidated and were tried together to the Court without a jury on September 11, 1957. They were submitted to the Court, following the filing of briefs, on January 2, 1958.

In action No. 3287, Wood-Mosaic Company (hereinafter referred to as "Company") seeks to recover corporation income and excess profits taxes paid for the fiscal years ended April 30, 1951, and April 30, 1952, in the aggregate sum of $152,926.43.

In action No. 3288, Wood-Mosaic Corporation (hereinafter referred to as "Corporation") seeks to recover corporation income taxes for the fiscal years ended April 30, 1952 and April 30, 1953, in the aggregate sum of $56,944.20. (Interest as provided by law is sought to be recovered by the plaintiff in each of the actions.)

By a written stipulation filed at the time of the trial, it appears that the Corporation was incorporated under

the laws of the State of Kentucky in 1907, under the corporate name "Wood-Mosaic Company." November 28, 1947, the corporate name was changed to "Wood-Mosaic Corporation." The Corporation has engaged in substantially the same business activities in the United States and Canada continuously from 1907 to the present date. The Company was incorporated under the laws of the State of Kentucky on November 28, 1947. Thereafter, on December 1, 1947, the Corporation transferred its operating assets and manufacturing facilities located in the United States to the Company and, in consideration of the transfer, received 177,810 shares of the common capital stock of the Company, which represented all of the outstanding and issued capital stock of the Company.

Both the Company and the Corporation kept their books and operated on the accrual basis of accounting and upon the basis of a fiscal year ending April 30th of each year; this fiscal year was used as the basis of their tax returns. The Corporation filed its corporation income and excess profits tax returns for each of the fiscal years ended April 30, 1951, and April 30, 1952, and paid the taxes disclosed to be due in each return . The Corporation likewise filed timely corporation income and excess profits tax returns for each of the fiscal years ended April 30, 1952, and April 30, 1953, and paid taxes disclosed to be due in each return.

March 29, 1956, the Commissioner of Internal Revenue notified the Company that a determination had been made of deficiencies in income and excess profits taxes for the fiscal year ended April 30, 1951, in the sum of $118,613.09, and for the fiscal year ended April 30, 1952, in the sum of $34,861.44.

March 29, 1956, the Commissioner of Internal Revenue notified the Corporation by letter that deficiencies had been determined in its income and excess profits taxes for the fiscal year ended April 30, 1952, in the sum of $20,640.15,

and for the fiscal year ended April 30, 1953, in the sum of $27,066.53.

The deficiencies and the interest thereon were paid by the Company and the Corporation to the District Director of Internal Revenue for the District of Kentucky. It is stipulated that both the Company and the Corporation timely filed their respective claims for a refund of the deficiencies in income and excess profits taxes and that, upon the claims for refund being officially disallowed and the separate claims for refund of interest having been ignored for more than six months by the Commissioner, these actions were timely filed.

The nine questions involved, as stated by counsel in their briefs, are substantially as follows:

1. Whether the Commissioner erred in disallowing a deduction of a loss in the sum of $3,366.29, claimed by Wood-Mosaic Company for the fiscal year 1951, under the provisions of Section 23(f) of the Internal Revenue Code of 1939, on account of the alleged abandonment of machinery and equipment in that year. (Taxpayer was allowed to amortize or depreciate the amount disallowed over the next succeeding five years.)

2. Whether the Commissioner erred in disallowing a deduction in the sum of $40,000.00 claimed by Wood-Mosaic Company for the fiscal year 1951, under the provisions of Section 23(q) of the Internal Revenue Code of 1939, as a charitable contribution to MacLean Foundation.

3. Whether the Commissioner erred in disallowing a deduction of a loss or a reduction in the value of its inventory in the sum of $12,112.84, claimed by Wood-Mosaic Company for the fiscal year 1952, on account of the alleged damage to a supply of Philippine logs purchased and loaded on board ship prior to the close of its fiscal year 1952, but not received in the damaged condition until the following fiscal year.

4. Whether the Commissioner erred in refusing to allow Wood-Mosaic Company a loss claimed on account of the reduction in the value of its inventory of Philippine mahogany lumber at the close of its fiscal year 1952, in the sum of $15,264.50.

5. Whether the Commissioner erred in disallowing deductions claimed by Wood-Mosaic Company of its inventory of supplies on hand at the close of the fiscal years 1951 and 1952, in the sum of $6,439.61 and $2,098.40, respectively, as a result of its change in the method of accounting for such supplies from an inventory method to the method of expensing them as purchases were made.

6. Whether the Commissioner erred in disallowing a loss claimed by Wood-Mosaic Company for each of the fiscal years 1951 and 1952 in the sum of $5,000.00, respectively, of the amounts by which the value of its inventory of walnut veneers was written down during each of these years.

7. Whether the Commissioner erred in disallowing a write-down by the Wood-Mosaic Corporation in the value of its inventory of forearm gunstocks as at the end of the fiscal year 1952 to the extent of $5,782.35.

8. Whether Wood-Mosaic Company, as an "acquiring corporation" within the meaning of Section 462(a) of the Internal Revenue Code of 1939, as amended by the Excess Profits Tax Act of 1950, may elect to compute its excess profits tax credits under Part I, Sub-chapter D of Chapter 1, 1939 Code, or whether it was required to compute its excess profits tax credits under Part II of that subchapter for the purpose of determining its excess profits tax for the taxable year 1951.

9. Whether Wood-Mosaic Corporation, as a "component corporation" within the meaning of Section 461(b) of the Internal Revenue Code of 1939, as amended, is entitled to or may elect to use its own base period experience prior

to the date of transfer of its assets to Wood-Mosaic Company on November 28, 1947, in computing its excess profits credits for the purpose of determining its excess profits tax for the taxable years involved.[1]

• • • • • • • •

Questions No. 8 and No. 9, which pertain to the excess profits tax claims of the Company and the Corporation, respectively, present a difficult problem. As stated by counsel for the Company and the Corporation, it is their contention that the Corporation was entitled to compute its excess profits tax credits by using its own base period experience under Section 435(d) of the Internal Revenue Code of 1939, and that, since the Company did not elect to combine its base period experience with that of the Corporation under Part II of the Excess Profits Tax Act of 1950, the Corporation was permitted to use its own base period experience for the general average of the base period years under Section 435(d). The contention is that, since the Company did not claim the right to use and did not use any of the base period experience of the Corporation, the Corporation could use its own base period experience prior to December 1, 1947, under Section 461 of the Internal Revenue Code of 1939, especially in view of the fact that the Company had not elected to use Part II in the computation of its own excess profits tax credit.

In Section 42.151, Volume 7A, Merten's Law of Federal Income Taxation, it is stated, "(T)ransfer of all or a part of the base period experience of a component corporation (Wood-Mosaic Corporation) to an acquiring corporation (Wood-Mosaic Company) as a result of a Part II transaction is accompanied by a reduction to that extent in the base period experience which remains available for use in respect to the component corporation." In a note to this portion

[1]NOTE: The part of the Court's Memorandum disposing of the factual issues not before the Court is omitted.

of the section, the author states, "The component loses the right to use the part of its base period experience made available to the acquiring corporation even though in fact the latter, where it has an option, may not choose to use it."

In computing its excess profits tax credits to determine its excess profits tax liability for the fiscal year 1951, the Company considered itself a "new corporation", under the provisions of Section 445, Part I, Subchapter D, Chapter 1, Internal Revenue Code of 1939. This produced a lesser amount of excess profits tax than would have been calculated under the provisions of Sections 435 and 436 of that subchapter.

The Commissioner determined that the Company was an acquiring corporation within the meaning of Section 461 (a) (1)(A), Part II, Subchapter D, and did not qualify as a new corporation within the meaning of Section 461(d). The Commissioner concluded that the Company was not entitled to compute its average base period income under the provisions of Section 435, Part I, because of the provision of Section 462(g)(3), "In the case of a transaction described in Section 461(a) where the acquiring corporation had commenced business, within the meaning of Section 461(d), prior to the beginning of its base period, the acquiring corporation shall not be entitled to compute its average base net income under Section 445 in the manner provided therein or as provided in this section." Therefore, the Commissioner recomputed the excess profits tax credit of the Company for the taxable year 1951 and the unused excess profits tax credit carry-back from the year 1952 to the year 1951, which materially reduced the amounts claimed by the Company in its returns for 1951 and 1952.

In computing its excess profits tax credit to determine its excess profits tax liability for the fiscal years 1952 and 1953, the Corporation used its own base period earning experience and applied the provisions of Section 435, Part I,

Subchapter D. It thereby determined that no excess profits tax was due by it.

The Commissioner properly determined that the Corporation was a component corporation within the meaning of Section 461(b), Part II, Subchapter D, and could not compute its excess profits tax credits under Section 435, but that same were required to be computed under Part II.

There is no question but that the Corporation is a component corporation and the Company is an acquiring corporation, since the Corporation, on December 1, 1947, transferred to the Company all of its operating assets and manufacturing facilities in exchange for all of the outstanding capital stock of the Company. In this situation, Section 461(b), Part II, Subchapter D, makes the Corporation a component corporation, and Section 461(a), Part II, classifies the Company as an acquiring corporation. Since the Company was an acquiring corporation within the meaning of Section 461(a) it is considered, under Section 461(d), to have been in existence and to have had taxable years for all years during which the Corporation was in existence and is considered to have commenced business when the Corporation commenced business.

We conclude that the Company erroneously classified itself as a "new corporation" under Section 445. The Company computed its excess profits tax credits under the provisions of Section 445, Part I; but, as above stated, as an acquiring corporation under Section 461(a), Part II, Subchapter D, it was ineligible as a new corporation under Section 445. Therefore, the Commissioners determination that the Company was required to determine its average base period net income under Part II of the Excess Profits Tax Act was correct, and the Company could not elect to compute its excess profits tax credits other than under Part II of Subchapter D.

The Corporation, in its excess profits tax returns for the fiscal years ended April 30, 1952, and April 30, 1953, computed its excess profits tax credits under the provisions of Section 435(d), Part I, on the basis of its own average base period net income. On its return for the fiscal year 1952, it claimed an unused excess profits tax credit carry-over from the fiscal year 1951 in a substantial amount and, on the return for the fiscal year 1953, it claimed unused excess profits tax credit carry-overs from the fiscal years 1951 and 1952 in an aggregate amount of $478,722.21.

The Commissioner determined that the Corporation was required to compute its excess profits credits as a component corporation under Section 461(b), Part II; that it was not entitled to use its own base period experience prior to the day after the date of the Part II transaction (December 1, 1947) in the computation of its excess profits credits, and that under no provision of the Excess Profits Tax Act of 1950 could the excess profits credits be computed to be in excess of the minimum annual amount of $25,000.00 prescribed in Section 431, Part II. This resulted in the excess profits credit for each of the fiscal years 1952 and 1953 being reduced to $25,000.00, and thereby eliminated any unused excess profits credit carry-overs from the fiscal years 1951 and 1952 to the fiscal year 1953, since the excess profits net income for the fiscal year 1951 was only $178.46 less than the minimum credit and exceeded the minimum credit for the fiscal years 1952 and 1953.

The issue raised as to the Corporation is whether it is mandatorily required to have its excess profits credit determined under Part II, or whether it may elect to have it determined under Part II or under the provisions of Section 435(d), Part I. It is our view that it was contemplated by Congress that, and Part II so provides, ownership of the property which gave rise to earning in the base period years must determine the entity which has the right

to this experience in the excess profits tax years; therefore, an acquiring corporation may use the base period earning experience of the component corporation prior to the Part II transaction, but the component corporation is prohibited from so doing. If the component corporation remains in existence, it loses any benefit it might otherwise have from its experience prior to the Part II transaction (December 1, 1947). We think the Commissioner was correct in his determination of the Corporation's method by which its excess profits tax must be determined.

The conclusion reached by the Court will be the basis of the judgment to be submitted by counsel for the United States, upon proper notice to counsel for plaintiff.

Roy M. Shelbourne
United States District Judge

Charles F. Wood
Greenebaum, Barnett & Wood
Kentucky Home Life Building
Louisville, Kentucky
Attorney for Plaintiff

February 20, 1958.

J. Leonard Walker
United States Attorney
Louisville, Kentucky
Attorney for Defendant.

Title 26, Section 2—
Cross References

The cross references in this Chapter to other portions of the chapter, where the word "see" is used, are made only for convenience, and shall be given no legal effect.

TITLE 26—EXCESS PROFITS TAXES

PART I—RATE AND COMPUTATION OF TAX

Section 434. Excess profits credit—allowance

(*d*) *Domestic corporations.* In the case of a domestic corporation, the excess profits credit for any taxable year shall be an amount computed under section 435 or section 436, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed.

• • •

Section 435. Excess profits credit—based on income

(*a*) *Amount of excess profits credit.* The excess profits credit for any taxable year, computed under this section, shall be—

• • •

(*b*) *Base period.* As used in this subchapter the term "base period" means the period beginning January 1, 1946, and ending December 31, 1949, except that in the case of a taxpayer whose first taxable year under this subchapter was preceded by a taxable year which ended after December 31, 1949, and before April 1, 1950, and which began before January 1, 1950, the term "base period" means the period of 48 consecutive months ending with the close of such preceding taxable year.

(*c*) *Average base period net income—determination.* For the purposes of this section the average base period net income of the taxpayer shall be the amount determined under subsection (d), subject to the exception that if the taxpayer is entitled to the benefits of subsection (e) of this section, or section 442, 443, 444, 445 or 446, or any subsection of section 459, then the average base period net income shall be the amount determined under subsection (d)

or (e) or under such section or subsection, whichever results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed.

• • •

Section 445. Average base period net income—new corporation

(*a*) *New corporation.* A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

• • •

(*g*) *Ineligible corporations.*

(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

(2) The transactions to which paragraph (1) applies are as follows:

(A) The acquisition by the taxpayer from another corporation of properties the basis of which in its hands is determined by reference to the basis of such properties to the transferor;

(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by in-

dividuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

(C) The acquisition by the taxpayer of a substantial part of the properties distributed on or after December 1, 1950, by another corporation, if such properties constituted a substantial part of the business assets of such other corporation, and if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is owned directly or indirectly by individuals who at the time of such distribution owned directly or indirectly 50 per centum or more in value of the outstanding stock or outstanding voting stock of such other corporation;

(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

(*h*) *Cross references.*

(1) For definition of gross receipts, see section 435(e)(5).

(2) For computation of excess profits credit based on income in the case of certain reorganizations, see Part II of this subchapter. Added Jan. 3, 1951, 10:13 a.m., c. 1199, Title I, Section 101, 64 Stat. 1168, amended Oct. 20, 1951, 2:07 p. m., E. S. T., c. 521, Title V, Section 512, 65 Stat. 552.

PART II—EXCESS PROFITS CREDIT BASED ON INCOME IN CONNECTION WITH CERTAIN EXCHANGES

Section 461. Definitions

For the purposes of this Part—

(*a*) *Acquiring corporation.* The term "acquiring corporation" means—

(1) A corporation which has acquired—

(A) substantially all the properties of another corporation and the whole or a part of the consideration for the

transfer of such properties is the transfer to such other corporation of all the stock of all classes (except qualifying shares) of the corporation which has acquired such properties, or

• • •

(*b*) *Component corporation.* The term "component corporation" means—

(1) In the case of a transaction described in subsection (a)(1), the corporation which transferred the assets;

• • •

(d) [Existence of acquiring corporation.] For purposes of sections 435(e), 442, 443, 444, 445, and 446, any taxpayer which is an acquiring corporation shall be considered to have been in existence and to have had taxable years for any period during which it or any of its component corporations was in existence, and such corporation shall be considered to have commenced business on the earliest date on which it or any of its component corporations commenced business. Except for purposes of the previous sentence, a component corporation in a transaction described in subsection (a), other than one described in subsection (a)(1)(E), shall be deemed not to have been in existence or to have commenced business prior to the day after such transaction for purposes of determining the applicability of sections 435(e), 442, 443, 444, 445, and 446, to such corporation after such transaction. For purposes of the first sentence of this subsection, a corporation which was an acquiring corporation in a previous transaction shall be deemed to have been in existence for such period as is determined by the application of that sentence to that corporation with respect to that transaction. For purposes of this part, where sections 443(b), 444(c), 445(b), and 446(b) refer to the amount of a taxpayer's total assets as of the last day of its taxable year immediately

preceding the taxpayer's first taxable year under this subchapter, such references, where appropriate, shall be taken to mean the amount of such taxpayer's total assets as of the last day of its base period.

• • •

Section 462. Average base period net income—determination

• • •

(g) Use by acquiring corporation of alternative average base period net income provided for new corporations in section 445.

• • •

(3) In the case of a transaction described in section 461(a) where the acquiring corporation had commenced business, within the meaning of section 461(d), prior to the beginning of its base period, the acquiring corporation shall not be entitled to compute its average base period net income under section 445 in the manner provided therein or as provided in this section. In any such case, however, where the acquiring corporation (other than a corporation created incident to the transaction) and all of the component corporations were, prior to the transactions, entitled to compute their average period net incomes under sections 442(d), 443, 444, 445, or 446, the acquiring corporation may add an average base period net income computed under section 445 of any of the parties to the transaction to such other average base period net incomes for the purpose of determining its average base period net income after the transaction under the section applicable to it prior to the transaction.

• • •

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No. 797

In the Supreme Court of the United States

OCTOBER TERM, 1959

WOOD-MOSAIC COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
I. HENRY KUTZ,
JOSEPH KOVNER,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Argument	3
Conclusion	7
Appendix	8

CITATIONS

Cases:	
General Retail Corp. v. *Commissioner*, 262 F. 2d 591, affirming 29 T.C. 632, certiorari denied, 360 U.S. 918	6
Phinney v. *Tuboscope Co.*, 268 F. 2d 233	6
Statutes:	
Excess Profits Tax Act of 1950, c.1199, 64 Stat. 1137	3
Internal Revenue Code of 1939:	
Sec. 430(a) (26 U.S.C. (1952 ed.) 430(a))	3
Sec. 435(b) (26 U.S.C. (1952 ed.) 435(b))	2, 4, 8
Sec. 445 (26 U.S.C. (1952 ed.) 445)	3, 4, 5
Sec. 445(a) (26 U.S.C. (1952 ed.) 445(a))	2, 4, 6, 8
Sec. 445(g) (26 U.S.C. (1952 ed.) 445(g))	2, 5, 9
Sec. 461 (26 U.S.C. (1952 ed.) 461)	4, 5, 6, 10
Sec. 461(a) (26 U.S.C. (1952 ed.) 461(a))	2, 4, 10
Sec. 461(b) (26 U.S.C. (1952 ed.) 461(b))	2, 4, 10
Sec. 461(d) (26 U.S.C. (1952 ed.) 461(d))	2, 4, 5, 10
Sec. 462(g) (26 U.S.C. (1952 ed.) 462(g))	4, 11
Miscellaneous:	
H. Rep. No. 3142, 81st Cong., 2d Sess., pp. 63–64 (1951–1 Cum. Bull. 187, 231–232)	5
S. Rep. No. 2679, 81st Cong., 2d Sess., p. 38 (1951–1 Cum. Bull. 240, 266)	5
Treasury Regulations 130:	
Sec. 40.461–1	5
Sec. 40.461–4	5

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WOOD-MOSAIC COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky (Pet. 17–25) is reported at 160 F. Supp. 631. The *per curiam* opinion of the court of appeals (Pet. 17) is reported at 272 F. 2d 944.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1959 (Pet. 17). The petition for certiorari was filed on March 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a corporation, which acquired substantially all of the operating assets of another corporation in

exchange for all of its stock, is a new corporation, within the meaning of the excess profits tax statute.

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code of 1939, Sections 435(b), 445 (a) and (g), 461 (a), (b) and (d), and 462(g), are printed in the Appendix, *infra*, pp. 8–11.

STATEMENT

This case, arising out of suits for refund of excess profits taxes for the years 1951, 1952, and 1953, involves two corporate taxpayers—Wood-Mosaic Corporation, hereafter referred to as the "Corporation," and Wood-Mosaic Company, hereafter referred to as the "Company." The Corporation has been engaged in substantially the same business continuously since 1907. The Company was incorporated on November 28, 1947. On December 1, 1947, the Corporation transferred its operating assets and manufacturing facilities located in the United States to the Company and, in consideration of the transfer, received all of the outstanding and issued capital stock of the Company (Pet. 17–18).

The Commissioner determined that the Company was not a new corporation within the meaning of the excess profits tax provisions of the Internal Revenue Code of 1939, but instead was an acquiring corporation with the base period of its predecessor, and assessed taxes accordingly. The Commissioner also determined that, within the meaning of the Code, the Corporation was a "component" corporation which

had surrendered its base period with respect to the assets transferred to the Company. The taxpayers paid the taxes as assessed by the Commissioner and sued for refunds on the theory that the Company was a "new corporation" within the meaning of Section 445 of the Internal Revenue Code of 1939, Appendix, *infra*, p. 8. The taxpayers also contended that the Corporation was entitled to use the base period earning experience of the assets transferred to the Company, which would result in no excess profits tax to it (Pet. 18, 22–23).

The two refund suits were tried jointly (Pet. 17). The district court upheld the Government on both issues (Pet. 21–25), and the court of appeals affirmed upon the findings of fact and conclusions of law of the district court (Pet. 17).

ARGUMENT

The question presented involves the interpretation of certain provisions of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137, which became effective on January 3, 1951, as a part of the Internal Revenue Code of 1939 (Subchapter D of Chapter I, Sections 430–472). The decision below correctly construes the statute in accordance with its express terms, no conflict exists, and there is no other reason for further review. The question does not have any future public importance, since by its terms the excess profits tax is not imposed for taxable years beginning on or after January 1, 1954 (Section 430(a)).

Section 445 provides a preferential excess profits credit for a new corporation. The preferential credit

is computed by using a prescribed average rate of return on invested capital for classified industries, upon the assumption that a new corporation has no prior business experience or base period on which actual average earnings can be computed. Section 445(a), Appendix, *infra*, p. 8, defines a new corporation as a corporate taxpayer "which commenced business after the first day of its base period", which is fixed for the facts of this case by Section 435 (b), Appendix, *infra*, p. 8, as January 1, 1946. While the critical phrase "commenced business' is not defined in Section 445 itself, it is defined by Section 461 in Part II of the excess profits tax provisions. Section 461(a), Appendix, *infra*, p. 10, defines an acquiring corporation as one which, in exchange for all of its stock, has acquired all of the properties of another or a "component corporation." See Section 461(b), Appendix, *infra*, p. 10. Section 461(d), Appendix, *infra*, pp. 10–11, provides that for the purposes of Section 445 (and other prior sections) any taxpayer which is an acquiring corporation "shall be considered to have commenced business on the earliest date on which it or any of its component corporations commenced business." Section 461(d) goes on to provide that the component corporation shall not be deemed, for the purposes of Section 445, to have commenced business prior to the acquistion. Moreover, Section 462(g), Appendix, *infra*, p. 11, which deals with the application of the preferential credit for new corporations provided in Section 445 to Part II transactions, provides that an acquiring corporation, which by virtue of Section 461(d) commenced business before

January 1, 1946, "shall not be entitled to compute its average base period net income under section 445 * * *."[1]

The Company in this case is clearly an acquiring corporation and the Corporation is a component corporation. Therefore, by virtue of the express provisions of the statute, the Company is not a new corporation, but is required to use the experience of its predecessor in computing its excess profits credit. Moreover, under Section 461(d) the Corporation has surrendered the earnings experience of the transferred assets to the Company.

The taxpayers' contention (Pet. 13)—that they can elect whether to proceed under Section 445 or Section 461 since the latter section is not mandatory—is contrary to the express terms of Section 461. The statute adopts the not unusual procedure of defining in one section the terms used in another, and describing the scope of the definition in the defining, rather than in the defined, section. Therefore, the taxpayers are mistaken in claiming that Section 445 can be read without reference to Section 461 so that any corporation which was organized after January 1, 1946, but which acquires a prior business, is a new corporation for the purposes of Section 445, unless it is excepted by Section 445(g).

---

[1] The House and Senate Committee Reports simply restate the express language of the statutory provisions. H. Rep. No. 3142, 81st Cong., 2d Sess., pp. 63–64 (1951–1 Cum. Bull. 187, 231–232); S. Rep. No. 2679, 81st Cong., 2d Sess., p. 38 (1951–1 Cum. Bull. 240, 266). The Treasury Regulations 130, Sections 40.461–1 and 40.461–4, added by T. D. 5865, 1951–2 Cum. Bull. 97, are consistent with the express statutory language described above.

Section 445(g), Appendix, *infra*, p. 9, on its face applies only to transactions taking place after December 1, 1950, covers transactions other than acquisitions defined in Section 461, and in no way qualifies the application of the Section 461 definition of "commenced business" to Section 445(a). Thus, far from rendering various portions of the statute inconsistent with each other as the taxpayers claim (Pet. 13), the analysis of the statute which we have made above is the only one in accord with its express terms.

Phinney v. *Tuboscope Co.*, 268 F. 2d 233 (C.A. 5), upon which the taxpayers rely to show a conflict (Pet. 13), is actually in accord with the decision below, since it holds (1) that the definitions in one section of the excess profits tax provisions of the 1939 Code apply to another by "the shorthand method of incorporation by reference" (*id.* at 236); (2) that Section 445(g) covers transactions that "would not meet the definition of an acquiring corporation under Section 461" (*id.* at 237); and (3) that, as a matter of principle, the benefit of the favorable excess profits credit for new corporations is not conferred upon the "continuation of a long existing organization and business" under a new corporation shell (*id.* at 239). See also *General Retail Corp.* v. *Commissioner*, 262 F. 2d 591 (C.A. 6), affirming 29 T.C. 632, certiorari denied, 360 U.S. 918.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
I. HENRY KUTZ,
JOSEPH KOVNER,
Attorneys.

MAY 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 435 [as added by Sec. 101, Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137]. EXCESS PROFITS CREDIT—BASED ON INCOME.

* * * * *

(b) *Base Period.*—As used in this subchapter the term "base period" means the period beginning January 1, 1946, and ending December 31, 1949, except that in the case of a taxpayer whose first taxable year under this subchapter was preceded by a taxable year which ended after December 31, 1949, and before April 1, 1950, and which began before January 1, 1950, the term "base period" means the period of 48 consecutive months ending with the close of such preceding taxable year.

* * * * *

(26 U.S.C. (1952 ed.) 435)

SEC. 445 [as added by Sec. 101, Excess Profits Tax Act of 1950, *supra*]. AVERAGE BASE PERIOD NET INCOME—NEW CORPORATION.

(a) *New Corporation.*—A taxpayer which commenced business after the first day of its base period shall, except as provided in subsection (g), be considered a new corporation for the purposes of this section, and its average base period net income determined under this section shall be the amount computed under subsection (b).

* * * * *

(g) *Ineligible Corporations.*—

(1) If a taxpayer, on or after December 1, 1950, and prior to the end of its third taxable year, acquires any properties in any of the transactions described in paragraph (2), it shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled to the benefits of this section except under the circumstances and subject to the limitations provided in section 462(g).

(2) The transactions to which paragraph (1) applies are as follows:

(A) The acquisition by the taxpayer from another corporation of properties the basis of which in its hands is determined by reference to the basis of such properties to the transferor;

(B) The acquisition by the taxpayer of a substantial part of its assets from another corporation, or of a substantial part of the properties of another corporation, if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is directly or indirectly owned, at the time of such acquisition, by individuals owning directly or indirectly 50 per centum or more in value of the outstanding stock, or outstanding voting stock of the transferor;

(C) The acquisition by the taxpayer of a substantial part of the properties distributed on or after December 1, 1950, by another corporation, if such properties constituted a substantial part of the business assets of such other corporation, and if 50 per centum or more in value of the outstanding stock or outstanding voting stock of the taxpayer is owned directly or indirectly by individuals who at the time of such distribution owned directly or indirectly 50 per centum or more in value of the outstanding stock or outstanding voting stock of such other corporation;

(3) For the purposes of this subsection, the provisions of section 503 shall be applicable in the determination of ownership of stock.

* * * * *

(26 U.S.C. (1952 ed.) 445)

PART II [as added by Sec. 101, Excess Profits Tax Act of 1950, *supra*]—EXCESS PROFITS CREDIT BASED ON INCOME IN CONNECTION WITH CERTAIN EXCHANGES

SEC. 461. DEFINITIONS.

For the purposes of this Part—

(a) *Acquiring Corporation.*—The term "acquiring corporation" means—

(1) A corporation which has acquired—

(A) substantially all the properties of another corporation and the whole or a part of the consideration for the transfer of such properties is the transfer to such other corporation of all the stock of all classes (except qualifying shares) of the corporation which has acquired such properties, or

* * * * *

(b) *Component Corporation.*—The term "component corporation" means—

(1) In the case of a transaction described in subsection (a)(1), the corporation which transferred the assets;

* * * * *

(d) For purposes of sections 435(e), 442, 443, 444, 445, and 446, any taxpayer which is an acquiring corporation shall be considered to have been in existence and to have had taxable years for any period during which it or any of its component corporations was in existence, and such corporation shall be considered to have commenced business on the earliest date on which it or any of its component corporations commenced business. Except for purposes of the previous sentence, a component corporation

in a transaction described in subsection (a), other than one described in subsection (a)(1)(E), shall be deemed not to have been in existence or to have commenced business prior to the day after such transaction for purposes of determining the applicability of sections 435(e), 442, 443, 444, 445, and 446, to such corporation after such transaction. * * *

* * * * *

(26 U.S.C. (1952 ed.) 461)

SEC. 462. AVERAGE BASE PERIOD NET INCOME—DETERMINATION.

* * * * *

(g) *Use by Acquiring Corporation of Alternative Average Base Period Net Income Provided for New Corporations in Section 445.*—

* * * * *

(3) In the case of a transaction described in section 461(a) where the acquiring corporation had commenced business, within the meaning of section 461(d), prior to the beginning of its base period, the acquiring corporation shall not be entitled to compute its average base period net income under section 445 in the manner provided therein or as provided in this section. * * *

* * * * *

(26 U.S.C. (1952 ed.) 462)

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